



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: JULY 14, 2022

IN THE MATTER OF:

Appeal Board No. 622097

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed March 17, 2022 (), the Administrative

Law Judge, granted the employer's application to reopen A.L.J. Case No. 022-00088, overruled the employer's objection and sustained the initial determination.

The employer appealed the Judge's decision to the Appeal Board, insofar as it overruled their objection and sustained the initial determination. The Board considered the arguments contained in the written statement submitted on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer's homeless shelter as a

fulltime residential aide from August 17, 2017 until July 23, 2021. He worked the overnight shift from 12 a.m. to 8 a.m. and was allowed a 30-minute break per shift. The claimant worked this shift with another male aide and a security guard. The claimant's duties were to make rounds during his shift and, when not on rounds, to man a post at the entrance of the shelter; he and his coworker manned the post together. The claimant was aware of the employer's policy which prohibited sleeping on the job.

The site director viewed video footage taken by a security camera at the shelter and believed that the claimant was sleeping for several hours during his shifts on July 8, July 14, and July 19, 2021. The employee relations manager met with the claimant and advised the claimant that he had been observed on video security footage sleeping on his shifts. The claimant denied sleeping while on duty, explained that there were two other individuals working during these same shifts and asked to see the employer's evidence. The employer refused to show the video to the claimant and, although the employer could have preserved the video evidence, they did not do so. The claimant was discharged on July 23, 2021, because the employer believed he had been sleeping on the job.

OPINION: The credible evidence establishes that the claimant was discharged because the employer believed he was sleeping on the job. We accept the claimant's credible testimony that he was not sleeping on the job and that he did not admit to doing so when confronted by the employer over the employer's contentions to the contrary. We note that there was nothing in the record to impeach the claimant's credibility. The claimant credibly testified that he had not been sleeping on the job, particularly since he knew that to do so would result in his termination and denied making any admission at the time he was presented with the employer's allegation. Instead, he testified that, when confronted, he had, in fact, questioned the allegation by requesting to see the evidence against him.

In contrast, the testimony of employee relations manager, who testified for the employer, was vague and inconsistent. Although the manager alleged that the claimant admitted sleeping on the job when confronted, the manager could not recall how long of a conversation he had with the claimant, what he said to the claimant or what the claimant said in response. In addition, we note the manager's concession that the claimant had asked to see the employer's evidence against him. As an employee who questions the allegation by requesting to see the evidence against him is inconsistent with an employee

who readily admits the allegation against him, we find the testimony of the employer's witness to also be inconsistent.

The employer notably did not contest the claimant's testimony that there were two other individuals working the same shifts as the claimant and has not offered any evidence to rule out that it was not one of these individuals seen in the employer's video footage. We find it particularly significant that the employer would not allow the claimant to view the evidence against him and that, although they could have preserved the video evidence, the manager readily admitted that he did not do so without offering a reasonable explanation for failing to do so. Accordingly, we conclude that the credible evidence fails to establish that the claimant was sleeping on the job.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is affirmed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in

the future, is overruled.

The initial determination, holding the claimant eligible to receive benefits, is sustained.

The claimant is allowed benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER